



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 24, 1998

Mr. Rick Perry  
Commissioner  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR98-1038

Dear Commissioner Perry:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 114907.

The Texas Department of Agriculture (the "department") received a request for the acreage of every Texas Cotton Breeder member who has grown the seed variety TAMCOT SPHINX in 1997. You have released to the requestor the requested acreage information for those members who have consented to release of the information. You assert that the requested information for those members who have objected to disclosure of the information or failed to provide the department with a response is excepted from public disclosure by section 552.110 of the Government Code.

Pursuant to section 552.305 of the Government Code, we notified the following parties of the request for information and of their opportunity to claim that the information at issue is excepted from disclosure: Associated Farmer Delinting, G & P Seed Co., Inc., Texas Agricultural Experiment Station Foundation Seed Service, and P & H Seed, Inc.<sup>1</sup> None of the parties responded to our notification. However, the department has submitted arguments on behalf of the affected third parties and argue that the requested information is confidential commercial information under section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act, 5 U.S.C. § 552, when applying the second prong of section 552.110.

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<sup>1</sup>You inform this office that P & H Seed, Inc. no longer objects to release of the requested information.

In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

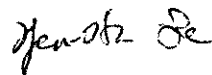
You submit the following argument:

The agricultural niche of closed pedigrees for commercial seed growers is a highly specialized very expensive field of operation. Seed growers may spend millions of dollars crossing varieties to develop a particular strand of seed that suits a particular region of the world. . . . Divulging how many acres a Texas producer dedicates to a particular variety of seed allows the producer's competitors to gauge just how much of the particular seed variety the producer will market. In essence, access to this sensitive information would reveal the growers' marketing strategies and allow competitors to fashion their own initiatives accordingly.

Furthermore, you contend that disclosure of the requested information would impair the department's ability to obtain necessary information in the future. After a review of the department's arguments, we agree that the acreage information is excepted from public disclosure under the commercial or financial information prong of section 552.110. Thus, the department must withhold the acreage information under section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/rho

Ref.: ID# 114907

Enclosure: Submitted document

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